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IN THE

Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND
BOEING NORTH AMERICAN, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA AND UNITED
STATES OF AMERICA *EX REL.* JAMES S. STONE
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

ALAN I. HOROWITZ
Counsel of Record
ROBERT K. HUFFMAN
PETER B. HUTT II
R. WESTON DONEHOWER
MILLER & CHEVALIER
CHARTERED
655 15th Street, NW, Suite 900
Washington, D.C. 20005
(202) 626-5800

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INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting a limited and accountable government, supporting the free enterprise system, and opposing abusive enforcement actions and civil litigation by the government and private litigants. WLF regularly participates in important constitutional and statutory litigation raising these issues.

WLF has appeared before this Court and other federal courts in several cases raising significant issues regarding the civil False Claims Act (FCA). *See, e.g., R & F Properties of Lake County, Inc. v. United States ex rel. Walker, petition for cert. pending*, No. 06-152; *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Boeing Co. v. United States ex rel. Kelly, cert. denied*, 510 U.S. 1140 (1994); *Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999).

In addition, WLF's Legal Studies Division produces and distributes legal public policy publications on numerous topics, including the False Claims Act. *See, e.g.*, J. Andrew Jackson & Edward W. Kirsch, THE *QUI TAM* QUAGMIRE: UNDERSTANDING THE LAW IN AN ERA OF AGGRESSIVE EXPANSION (WLF Monograph) (1998); John T. Boese, *New False Claims Law Incentives Pose Risk to Contractors and States* (WLF Working Paper) (June 2006); J. Andrew Jackson, *A Law Gone Rogue: Time to Return Fairness to the False Claims Act* (WLF Legal Backgrounder) (Dec. 16, 2005).

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[1] In accordance with Rule 37.6, amici curiae certify that counsel for a party did not author this brief in whole or in part and that no entity other than amici or their counsel made a monetary contribution to the preparation or submission of the brief.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has previously appeared in this Court as amicus curiae in other cases involving interpretation of federal statutes. *See, e.g.*, *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

Amici curiae submit that over the last two decades the 1986 amendments to the FCA have spawned abusive punitive litigation against businesses, both large and small, to the detriment of those businesses, their employees, their shareholders, and the public at large. The decision of the court of appeals below is particularly troubling in that it upholds and facilitates such *qui tam* suits in circumstances where those suits unquestionably serve no public purpose because the plaintiffs played no role in helping the government protect itself against fraud. Amici believe that this brief will bring an additional perspective to the issue presented in this case and will assist the Court in construing the public disclosure bar of the FCA.

Counsel for the parties have consented to the filing of this brief, as reflected in letters filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The text of section 3730(e)(4)(A) of the False Claims Act creates a general jurisdictional bar for *qui tam* suits based upon certain publicly disclosed information unless the relator is an "original source of the information." The natural reading of the provision correlates the exception with the general rule. That is, "the information" for which the relator must be a source is the information previously referenced in the sentence – namely, the publicly disclosed information. Thus, a relator can qualify as an "original source" only if he or she is a source of the publicly disclosed information. This reading is confirmed by the explanation of this specific language by the primary sponsor of the legislation. Senator Grassley stated that this

provision "seeks to assure that a *qui tam* action based solely on public disclosures cannot be brought by an individual . . . who had not been an original source *to the entity that disclosed the allegations*." 132 Cong. Rec. 20530, 20536 (1986) (emphasis added).

The Tenth Circuit erred in failing to interpret the statute in this way, instead holding that the definitional subsection (B) of section 3730(e) sets forth the *exclusive* requirements for qualifying as an original source. That interpretation conflicts with this Court's settled approach to statutory interpretation, which requires consideration of the statute as a whole – even when the statute contains a definitional section. *See, e.g., Philko Aviation, Inc. v. Shacket*, 462 U.S. 406 (1983). The court's reading also allows a relator to qualify as an "original source" when he is not a "source" in any meaningful way. Moreover, the legislative history shows that Congress intended for subsection (B) to provide a further gloss on the meaning of "original source," but not to supplant the requirement in subsection (A) that the *qui tam* relator be a source of the public disclosure.

Finally, the Tenth Circuit's interpretation undermines the policy of the FCA to encourage individuals to assist the United States in uncovering fraud. In situations where an individual has knowledge of fraud, the Tenth Circuit's interpretation rewards him or her for remaining silent and disclosing the information to the government only on the eve of filing suit, when it is of no assistance. The public disclosure bar would in no way discourage that undesirable conduct. Conversely, a rule limiting the original source exception to relators who are the source of the public disclosure creates an incentive for relators to divulge their information "at the earliest possible time," lest the public disclosure bar come into play. *See Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

ARGUMENT

THE "ORIGINAL SOURCE" EXCEPTION TO THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE BAR APPLIES ONLY TO PLAINTIFFS WHO ARE A SOURCE OF THE PUBLIC DISCLOSURE

The "public disclosure" bar of the False Claims Act (FCA), 31 U.S.C. § 3730(e)(4), seeks to advance the fundamental goal of the Act's *qui tam* provisions – namely, enlisting and rewarding private whistleblowers to the extent they can assist in uncovering fraud against the government. In so doing, the provision navigates a middle ground between two competing imperatives. On the one hand, the provision restricts the availability of *qui tam* suits in order to prevent relators who provide no useful assistance to the government from maintaining "parasitic" lawsuits that would enrich those relators at the expense of the government. On the other hand, the provision limits the scope of that jurisdictional bar in order to preserve the *qui tam* suit as an incentive and reward for relators who do assist in uncovering fraud.

The legislative process that sought to balance these competing interests yielded an imperfectly drafted provision containing two subsections that do not seamlessly mesh together. As a result, the courts of appeals have struggled with delineating the qualifications for the original source exception, and some courts erroneously have disregarded important parts of the statute. When section 3730(e)(4) is properly interpreted as an integrated whole, it is apparent that respondent Stone did not make a disclosure that would qualify him as an original source and hence vest the district court with jurisdiction over his lawsuit.

A. The Text of Section 3730(e)(4) Identifies an "Original Source" as the Source of the Publicly Disclosed Information

The False Claims Act's public disclosure provision was added to the statute in 1986. As discussed in more detail *infra* (at 14-20), Congress sought to modify the existing restriction on *qui tam* suits that had completely barred suits based on information in the hands of the government, even in situations where the goals of the Act would be advanced by such suits. *See generally Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 945-50 (1997). Congress, however, merely modified, rather than eliminated, the restriction because it still wanted to prohibit *qui tam* suits that did not serve the statute's goal of promoting whistleblowing. The rule that emerged, set forth in section 3730(e)(4)(A), contains a general jurisdictional bar and an exception to that bar:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Thus, the general rule is that a relator cannot bring a *qui tam* suit that is based upon information that has been publicly disclosed in certain specified ways. There is an exception to that prohibition for an "original source of the information." The statute does not specifically define the phrase "the information." The only logical reading of the phrase, however, is that it refers to the information previously referenced in the first part of the sentence – namely, the "allegations or transactions" that were publicly disclosed. *See Schumer*, 520 U.S. at 950.

There is no other "information" to which the phrase could refer back.

This interpretation provides a coherently stated rule. The exception (for a source of the public disclosure) is correlated with the general rule (which is triggered by a public disclosure). Moreover, this exception serves the statute's goal of encouraging whistleblowers to assist in exposing fraud against the government. In situations where a relator is the original source of a disclosure, it plainly would be counterproductive and create a strong disincentive to whistleblowing if that disclosure were to operate as a bar to that relator's *qui tam* suit.

Section 3730(e)(4) then goes on in subsection (B) to delineate the meaning of the term "original source" more precisely:

> For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

This subsection fleshes out the rule of subsection (A) in certain important respects. *See* 132 Cong. Rec. 20530, 20536 (1986) (statement of Sen. Grassley) (explaining that subsection (B) "further define[s]" the term "original source"). It explains that the word "original" means that the source must have "direct and independent knowledge." It also mandates that the relator must make a timely disclosure of the information "to the Government" in order to qualify for the "original source" exception. Subsection (B), however, also muddies the rule because it does not purport to define the phrase "of the information," and hence it neither reemphasizes nor eliminates the connection that is evident in subsection (A) between the information that is publicly disclosed and the relator's status as a source of that information. Indeed, subsection (B) does not mention the public disclosure at all, instead addressing only a disclosure from the relator to the government and the timing of

the relator's lawsuit. This disconnect between subsections (A) and (B) has confounded the courts of appeals in trying to apply the public disclosure provision, with the courts adopting several different interpretations.

The most simplistic approach is exemplified by *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), which avoids the problem by completely ignoring subsection (A). The Fourth Circuit stated that, because there exists "a definition of 'original source' in sub-paragraph (B)," that subparagraph "necessarily" sets forth "the exclusive requirements that a qui tam plaintiff must satisfy to be an 'original source.'" *Id.* at 1351 (internal quotation omitted). Therefore, the Fourth Circuit held, in order to be an "original source" a *qui tam* plaintiff "having direct and independent knowledge of the information on which the allegations in the public disclosure is based . . . need only provide his information to the government before instituting his qui tam action." *Id.* at 1355.

The Fourth Circuit's approach yielded a result plainly at odds with the goals of the FCA. The relator in *Siller* was able to maintain a *qui tam* suit (which was based on allegations disclosed two years earlier in a lawsuit brought against the same defendant by the relator's employer) by invoking a disclosure that did not contribute in any way to uncovering fraud. Only *one week* before filing his lawsuit in 1991, the relator furnished a statement of evidence to the government that mirrored the allegations that had long before been publicly disclosed. *Id.* at 1341. The relator acknowledged that he had been aware of the alleged fraud at least four years earlier, before any lawsuits had been filed against the defendant, but that he had taken no steps to inform the government of his knowledge until after he learned of the FCA's *qui tam* provisions and had retained counsel to commence a *qui tam* suit. *See id.* at 1341 & n.1. Thus, in *Siller*, the *qui tam* relator was no whistleblower. To the contrary, he withheld his information from the government for years and disclosed it only to facilitate his own lawsuit

through literal compliance with the terms of section 3730(e)(4)(B) – at a time when the information provided no assistance to the government whatsoever.

The court of appeals in this case has adopted the same construction of "original source" as the Fourth Circuit, looking exclusively to the requirements of knowledge and disclosure to the government set forth in subsection (B) and ignoring entirely the actual jurisdictional rule stated in subsection (A). Pet. App. 11a, 15a; *see also United States v. Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1999) (adopting the same interpretation). Other courts of appeals, however, have correctly ruled that this interpretation fails to give effect to the entire statute and contravenes the evident intent of Congress. This Court should correct the Tenth Circuit's error and hold that respondent Stone cannot maintain his lawsuit unless he is an original source of the publicly disclosed information.

One of the first cases to interpret the public disclosure bar was *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990), which correctly adopted a more nuanced approach to the statute than did the Fourth Circuit in *Siller*. The court refused to ignore the disconnect between subparagraphs (A) and (B) of section 3730(e)(4). Instead, it observed that "the most natural reading of para. (4)(A) suggests that the 'information' there referred to [for which the relator must be the original source] is that which was publicly disclosed." *Id.* at 17. Noting that subparagraph (B) apparently referred to a different information disclosure, the court therefore concluded that "para. 4(B) does not contain the exclusive requirements in order for one to be an 'original source.'" *Id.* *See also United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 689 (D.C. Cir. 1997) (criticizing the Fourth Circuit for failing "to harmonize subparagraph (B) with subparagraph (A), each of which we find to be a necessary component of the exception"). The Second Circuit added that its decision also furthered the FCA's purpose of rewarding

those who "'bring . . . wrongdoing to light'" because "it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time." 912 F.3d at 18 (quoting S. Rep. No. 99-345, at 14 (1986)).

The Ninth Circuit adopted the same interpretation in *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), holding that, "[t]o bring a *qui tam* suit [once there has been a public disclosure], one must have had a hand in the public disclosure of allegations that are a part of one's suit." *Id.* at 1418. Like the Second Circuit, the court ruled that it was necessary to look to subsection (A) as well as subsection (B), and it found that the text of subsection (A) should be construed in light of the history of the FCA, which "make[s] clear that *qui tam* jurisdiction was meant to extend only to those who had played a part in publicly disclosing the allegations and information on which their suits were based." *Id.* Specifically, the Ninth Circuit emphasized that the *qui tam* provisions are designed to reward whistleblowers, and "[a] 'whistleblower' sounds the alarm; he does not echo it." *Id.* at 1419.

The interpretation adopted by the Second and Ninth Circuits is the most sensible reading of the public disclosure bar of section 3730 (e)(4). Subsection (B) explicates and provides an additional gloss on the meaning of the term "original source" in subsection (A) that would not otherwise be apparent, but it does not supersede or eliminate the natural reading of that term in the context of subsection (A).

This reading gives effect to the entire statute and best implements the policies of the FCA. As explained below, it fully accords with the principles of statutory construction previously developed by this Court. And the legislative history reveals that it conforms to Congress's specific intent regarding the scope of the original source exception. Accordingly, this Court should reject the Tenth Circuit's overly expansive reading of the "original source" exception and confirm the natural reading

of the statute that the "source" referenced in subsection (A) is a source of the publicly disclosed information.

B. The Tenth Circuit's Interpretation of Section 3730(e)(4) Departs From Principles of Statutory Construction That Have Been Settled by This Court

The Tenth Circuit's overly expansive interpretation of the original source exception presumably rests on the same approach to statutory construction relied upon by the Fourth Circuit – namely, the proposition that subparagraph (B) "necessarily" sets forth the "exclusive requirements" because it is "a definition of 'original source.'" *Siller*, 21 F.3d at 1351. That inflexibly narrow focus on the terms of a definitional provision, however, conflicts with well-settled principles of statutory construction. This Court has often emphasized that, "[i]n determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *See, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986). That fundamental principle does not disappear when the statute contains a definitional provision. To the contrary, this Court has repeatedly rejected proposed statutory interpretations that rest entirely on the terms of a definition and ignore the overall design and object of a statute.

An early example is *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198 (1949), where the Court refused to construe a disability rule in accordance with the statutory definitions set forth in the Longshoremen's and Harbor Workers' Compensation Act. That statute generally provides that an employer is liable for total disability workers' compensation payments if an employee suffers an injury on the job resulting in total disability. Section 8(f)(1) of the Act modified that general rule in cases where the injury, standing alone, would have caused only a partial disability but in fact caused total disability because it was "combined with a previous disability." In that situation,

section 8(f)(1) provided that the employer would be liable only for partial disability payments and a separate federally administered fund would make up the balance necessary to compensate the employee for his total disability. *See id.* at 200. In *Lawson*, the employee had already been blind in one eye when hired and then an accident occurred that deprived him of sight in his good eye. The question before the Court was whether the preexisting blindness in one eye was a "previous disability" within the meaning of section 8(f)(1).

The government argued that the employer was liable for the entire payment because the statutory definition of "disability" did not encompass this employee's prior condition, which did not result from a workplace injury. ("Disability" was defined as "incapacity because of injury" and "injury" in turn was defined by statute as an injury occurring "in the course of employment."). *See id.* The Court, however, ruled that applying the statutory definition of "disability" to section 8(f)(1) would do a "disservice . . . to the purpose of the second injury provision." *Id.* at 201. The Court explained that a key goal of the provision was to encourage employers to hire partially disabled employees without fear that their existing partial disability would expose the employer to a heightened risk of liability for total disability payments. *Id.* at 201-02. Because a "mechanical" reading of the statutory definition would destroy this purpose, the Court held that the statutory definition was not controlling and the word "disability" in section 8(f)(1) should be construed in accordance with the "more usual concept of the word" to encompass disabilities that are not work-related. *Id.* at 201.

Closely analogous to the instant case is *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 409 (1983), where the Court expressly acknowledged that a different result would have obtained if the statute in question "were to be interpreted literally in accordance with the statutory definition." In *Philko*, a seller transferred a plane to a purchaser pursuant to an oral

sales agreement and then subsequently executed a written agreement to sell the same plane to another purchaser. Section 503(c) of the Federal Aviation Act of 1958 had provided that a "conveyance" of an aircraft would not be valid against a subsequent purchaser until it was filed with the Secretary of Transportation. 49 U.S.C. App. § 1403(c) (1982). The second purchaser therefore argued that the first sale was invalid because it was never filed with the Secretary. The statute, however, specifically defined the term "conveyance" as "a bill of sale, contract . . . or other instrument affecting title" (49 U.S.C. App. § 1301(20) (1982)), which would mean that section 503(c) did not come into play for sales not evidenced by a written instrument. This Court rejected the conclusion that would follow from applying the definition, however, stating that it was "convinced . . . that Congress did not intend § 503(c) to be interpreted in this manner." 462 U.S. at 409.

Instead, the Court held that section 503(c) should be construed to mean "that every aircraft transfer must be evidenced by an instrument, and every such instrument must be recorded, before the rights of innocent third parties can be affected." This construction added a new requirement of "evidenced by an instrument" that was not found in the statutory definition. *Id.* at 409-10. The Court's analysis primarily focused not on the definitional provision, but instead on section 503(c), the statutory section that set forth the rule whose interpretation was in dispute. The Court gave two primary reasons for its holding: (a) its interpretation of section 503(c) "would be by far the most natural one" "[i]n the absence of the statutory definition of conveyance"; and (2) literal application of the definition "would defeat the primary congressional purpose for the enactment of § 503(c)." *Id.* at 411.[2]

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[2] The Court also observed that the Act contained a section providing that the statutory definition is not applicable if "the context otherwise requires." *Id.* at 412. The Court did not rely on that section, how-

The Court's more recent decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), reflects the same unwillingness to apply a statutory definition mechanically. The government argued there that the FDA had jurisdiction to regulate tobacco products because tobacco met the statutory definition of a "drug." *See id.* at 126. Although the Court never suggested that tobacco fell outside the terms of the definition (*see id.* at 162 (Breyer, J., dissenting)), it nonetheless rejected the government's position as "contraven[ing] the clear intent of Congress." *Id.* at 132. The Court criticized the government's argument for asking the Court to "confine itself to examining a particular statutory provision in isolation" instead of examining the entire statute and construing it as "an harmonious whole." *Id.* at 132, 133 (internal quotation omitted). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 342-45 (1997) (although the statute contains a specific definition of the term "employee," that term can be given different meanings in different provisions in light of the broader context of the statute).[3]

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ever, stating that "[e]ven in the absence of such a caveat, we need not read the statutory definition mechanically into § 503(c), since to do so would render the recording system ineffective and thus would defeat the purpose of the legislation. A statutory definition should not be applied in such a manner." *Id.*

[3] The Court has also remarked in certain contexts that when a statute includes an explicit definition, the Court should follow that definition even if it varies from the term's ordinary meaning. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). Those statements, however, do not support the Tenth Circuit's approach here of ignoring subsection (A) of the FCA's original source provision. In *Stenberg*, the Court found that the statutory definition specifically included a certain procedure within the term "partial birth abortion," and it rejected the contradictory position that the procedure should nonetheless be excluded because of the common usage of that term. *See also id.* at 998 & n.14 (Thomas, J., dissenting) (discussing other cases). Here,

The Court's approach in these cases is equally applicable here. A proper interpretation of the original source exception cannot focus exclusively on the definitional subsection, but must consider subsection (A) as well, which is the governing provision that creates both the general public disclosure bar and the original source exception. Examining the same two factors that this Court relied upon in *Philko*, the most "natural reading" of the statutory rule is that "the 'information'" for which the relator must be the original source "is that which was publicly disclosed." *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d at 17. And an exclusive reliance on the definition in subsection (B) "would defeat" (*Philko*, 462 U.S. at 410) a fundamental purpose of the public disclosure bar because it would allow relators to profit from *qui tam* suits even where they deliberately refrain from providing any whistleblowing benefit to the government. Therefore, the original source exception is properly interpreted by harmonizing the two subsections of section 3730(e)(4) and giving effect to both of them, rather than by ignoring subsection (A) as did the court below.

C. The History of the Public Disclosure Bar Confirms That Congress Intended to Confine the Original Source Exception to Whistleblowers Who Were Sources of the Public Disclosure

The enactment of section 3730(e)(4) in 1986 grew out of Congress's dissatisfaction with the operation of an FCA provision that had completely barred *qui tam* suits based upon information in the hands of the government. The prior provi-

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however, the interpretation adopted by the Second and Ninth Circuits does not contradict or supersede subsection (B) or seek to exclude any of the attributes of an original source stated there. The interpretation simply augments the definition in subsection (B) by harmonizing it with the somewhat different focus of the statement of the primary rule in subsection (A). *See supra* at 5-6.

sion had been passed in 1943 in response to *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), where this Court held that the Act permitted a *qui tam* suit in which the relator based his complaint entirely upon a publicly available fraud indictment and "contributed nothing to the discovery of the fraud." *See id.* at 545-47. Congress found that result unacceptable and corrected the problem by barring all *qui tam* suits that were "based upon evidence or information in the possession of the United States . . . at the time such suit was brought." 57 Stat. 608 (1943). *See generally United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679-80 (D.C. Cir. 1997).

By 1986, however, it had become apparent that the 1943 legislation had "overcorrected" the problem because courts were barring *qui tam* suits in some situations where the relators were providing a whistleblowing benefit because they were original sources of the government's information concerning the fraud. The leading decision was *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), in which the State of Wisconsin sought to bring a *qui tam* suit after it had uncovered Medicare fraud and reported it to the federal government. The court found that the suit was barred because of the government's knowledge of the fraud, even though the government had obtained that knowledge solely through Wisconsin's disclosure. *See id.* at 1102 n.2. Although the court expressed sympathy for Wisconsin's objection that it should not lose its *qui tam* rights because it complied with its requirement to report Medicare fraud, the court stated that this argument was "'addressed to the wrong forum.'" *Id.* at 1107 (quoting *Hess*, 317 U.S. at 547). *See also Safir v. Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978) (similarly barring a *qui tam* suit where the relator was the source of the government's knowledge, but criticizing the statute).

As a result, the jurisdictional bar at issue in the *Wisconsin* case became one of the areas addressed by Congress when it

undertook a sweeping revision of the FCA in 1986. The Senate Report discussed the case at length and noted that the National Association of Attorneys General had adopted a resolution "strongly urg[ing] that Congress amend the False Claims Act to rectify the unfortunate result of the *Wisconsin v. Dean* decision." S. Rep. No. 99-345, at 12-13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277-78. The initial bill reported out of committee in late July 1986 sharply reduced the scope of the prior jurisdictional bar, prohibiting *qui tam* actions only when based upon allegations in a suit to which the government is already a party or within six months of certain public disclosures of the information. *Id.* at 43.

The Senate quickly determined, however, that this provision went too far in allowing *qui tam* suits where the relator was not contributing to exposure of the fraud. Accordingly, in early August 1986, the Senate adopted a very different version of the public disclosure provision. This new version resulted from an agreement between Senator Grassley, the principal sponsor of the FCA revision, and several other Senators who had raised concerns over the bill reported out of committee. The August version was very close to the statute at issue here, reading as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, a congressional, administrative, or Government Accounting Office report, or hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Govern-

ment or the news media prior to an action filed by the Government.

132 Cong. Rec. 20530, 20531 (1986).

This version did not present any problem of harmonizing the two subsections with respect to the scope of the "original source" exception. Subsection (A) was identical to the statute that exists today; its natural meaning was to impose a jurisdictional bar on suits based on publicly disclosed information unless the relator was an original source of the same information – that is, the information publicly disclosed in certain proceedings, government reports, or the news media. The last clause of subsection (B) fleshed out the meaning of "original source" in a way that correlated with the description in subsection (A). It made clear that the relator's disclosure must be voluntary and must occur prior to the commencement of a government action, two requirements that were not obvious from subsection (A) alone, but it plainly was referring to the same disclosure that made the relator a "source" of publicly disclosed information under subsection (A) – that is, a disclosure to "the Government or the news media."

Senator Grassley's explanation to the Senate of the scope of this amended provision explicitly confirmed the contemplation that an "original source" would have to be a source of the publicly disclosed information. He stated: "This amendment seeks to assure that a *qui tam* action based solely on public disclosures cannot be brought by an individual with no direct or independent knowledge of the information or who had not been an original *source to the entity that disclosed the allegations*. 132 Cong. Rec. 20530, 20536 (1986) (emphasis added).

The Senate subsequently made two changes in the final clause of the original source provision in October 1986, also pursuant to Senator Grassley's suggestion. As discussed above, these changes caused subsections (A) and (B) to mesh less well in the final version. It is apparent, however, that these changes were not intended to alter the rule that the original

source exception applies only to a source of the public disclosure. Indeed, they were designed to narrow the exception, not to expand it.

The first change related to the object of the disclosure described in the final clause of subsection (B); the Senate deleted the phrase "or the news media" from that clause. The second change affected the timing requirement for that disclosure. Instead of providing that the disclosure must occur before the government filed suit, the clause was changed to require a disclosure to the government before the *qui tam* relator filed suit. *See* 132 Cong. Rec. 28570, 28576 (1986). No change was made to subsection (A). Thereafter, this amended version was adopted by the House and signed into law.

The reasons for these changes appear self-evident. First, given that assisting *the government* in uncovering fraud is a key purpose of the statute, the Senate determined that a *qui tam* relator should not qualify as a original source unless he or she informs the government of the relevant information. Disclosure merely to the news media is not enough. Second, the Senate realized that it made more sense to key the temporal limitation on the disclosure to a suit brought by the relator, rather than by the government. The original source exception, after all, is an exception to the jurisdictional bar on suits brought *by relators*. There might never be "an action filed by the Government," in which case the disclosure requirement of subsection (B) would never be triggered under the August version of the statute.

The Fourth Circuit in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (1994), mistakenly concluded that these relatively minor alterations fundamentally changed the scope of the original source exception. The court was prepared to assume, based on Senator Grassley's explanation in August, that "Congress may at one point have intended a plaintiff to be a source to the disclosing entity to be an original source." *Id.* at 1353. Moreover, the court acknowledged that it

would be logical, "in the name of symmetry between subparagraphs (A) and (B), to require the provision of information to all disclosing entities identified in sub-paragraph (A)." *Id.* at 1354 n.14. But the court rejected that logical conclusion on the ground that "the deletion of 'the media' from sub-paragraph (B), if nothing else, is powerful evidence that Congress did not intend a symmetry between the two paragraphs." *Id. See also id.* at 1353 ("Congress presumably would not have deleted the media from the 'original source' definition in sub-paragraph (B) if it intended to require the plaintiff to provide his information to the disclosing entity").

The *Siller* court's analysis is flawed, however, because it presumes that the October 1986 changes were intended to *expand* the boundaries of the original source exception – by removing the requirement of being a source to the disclosing entity. In fact, the changes were designed to *contract* the category of persons who could qualify as an original source. Before the amendments, a relator could have qualified as an original source merely by making a disclosure to the media. The changes eliminated that possibility by requiring the relator to make another disclosure to the government before filing suit. Nothing inherent in the October changes or in any of the relevant explanations suggests a desire to make it easier to qualify as an original source. To the extent the October changes weakened the "symmetry" between subsection (A) and subsection (B), that was an inadvertent result of changes that were made with another goal in mind. Accordingly, this Court should construe the statute as a whole, giving effect to both subsections.

Indeed, the contemporaneous explanations on the floor of Congress indicate a clear intent to preserve the correlation between the concept of an "original source" and the public disclosure. Although Senator Grassley did not specifically address the changes made to subsection (B) of the original source provision, apparently considering them to be minor, he

did address another aspect of the statute that had been changed in October – namely, a proposed provision that limited the amount of recovery by "original source" *qui tam* relators whose suits were based primarily on publicly disclosed information that they had not supplied. *See* Proposed § 3730(d)(1), 132 Cong. Rec. 28570, 28576 (1986). Senator Grassley explained:

> When the *qui tam* plaintiff brings an action based on public information, meaning he is an "original source" within the definition under the act, but the action is based primarily on public information not originally provided by the *qui tam* plaintiff, he is limited to a recovery of not more than 10 percent. In other words, a 10 percent cap is placed on those "original sources" who bring cases based on information already publicly disclosed where only an insignificant amount of that information stemmed from that original source.

132 Cong. Rec. 28570, 28580 (1986). This explanation plainly contemplates that every "original source" must have been the source of at least some of the publicly disclosed information. It is therefore apparent that even after the October changes Senator Grassley still understood the statute as requiring that the relator be a source of the publicly disclosed information, and he communicated that understanding to the other legislators. In addition, Representative Berman, the primary House sponsor, described the legislation after the October changes as requiring that the relator have been "an original source to the entity that disclosed the allegations." 132 Cong. Rec. 29315, 29322 (1986). Thus, it is clear that the primary sponsors of the FCA amendments, when they changed the text of the original source provision in October 1986, did not intend to eliminate the requirement that an "original source" have been a source of the public disclosure. Nor was anything communicated to the rest of the legislators suggesting any such intent.

In sum, the legislative history confirms the interpretation that flows from reading together the text of both subsections of

section 3730(e)(4). A relator qualifies as an "original source" only if he or she is a source of the public disclosure.

D. The Interpretation Adopted by the Court of Appeals Fails to Implement the Basic Policies Underlying the Public Disclosure Bar

Notwithstanding the disagreements in the courts of appeals concerning the interpretation of the public disclosure bar, there is no uncertainty over the fundamental policies that underlie that provision. The *qui tam* provisions of the FCA are designed to encourage whistleblowers to assist in uncovering fraud committed against the United States. Allowing "parasitic" lawsuits by plaintiffs who do not themselves contribute to the government's efforts would not advance that goal, and therefore the public disclosure bar is designed to prevent such suits. *See, e.g., United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991). The original 1943 effort to prohibit parasitic suits, however, went too far. As reflected in *United States ex rel. Wisconsin v. Dean, supra*, it had the effect of barring *qui tam* suits in some situations where the relator had informed the government of the fraud. That result in turn "created its own perverse set of incentives [under which] whistle blowers were afraid to turn over their juiciest evidence of fraud to the government because disclosure would prevent them from using that evidence to get their reward in a *qui tam* action." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1016 (7th Cir. 1999).

The 1986 enactment of the public disclosure bar thus sought to achieve a "golden mean" between competing considerations. *See, e.g., Springfield Terminal*, 14 F.3d at 649. Specifically, the provision "is designed to promote private citizen involvement in exposing fraud against the government, while at the same time prevent parasitic suits by opportunistic late-comers who add nothing to the exposure of the fraud." *United States*

ex rel. Rabushka v. Crane Co., 40 F.3d 1509, 1511 (8th Cir. 1994). *See also United States ex rel. Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 565 (11th Cir. 1994) ("The 1986 amendments were intended to increase private citizen involvement in exposing fraud against the government while preventing opportunistic suits by private persons who heard of fraud but played no part in exposing it"). The Tenth Circuit's interpretation of section 3730(e)(4), however, frustrates Congress's attempt to achieve this "golden mean" because it rewards "opportunistic late-comers" "who heard of fraud but played no part in exposing it."

In holding that subsection (B) standing alone completely describes the qualifications for being an "original source," the Tenth Circuit has eviscerated the notion that the *qui tam* relator must be a "source," a policy goal that is at the heart of the rule stated in subsection (A). Under the court's holding, the disclosure by the relator that is contemplated by the statute can be purely formalistic; it need not contribute anything to the discovery of the fraud. The facts of *Siller* illustrate this failure to achieve the goals of the statute. The relator had knowledge of the fraud, but chose to sit on his knowledge for years until long after a public disclosure in which he played no role. His disclosure to the government was *pro forma*, designed to meet the literal terms of subsection (B), not to assist the discovery of fraud. *See Siller*, 21 F.3d at 1341. Thus, although the relator met the "original" or "direct and independent knowledge" element of the exception, he was not a "source" of the information in any meaningful way.

The policies of the exception, however, are served only by giving teeth to both the "original" and the "source" parts of the exception. As the Ninth Circuit observed, "[t]he Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' and not their mimics." *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Indeed, if the Tenth Circuit's interpretation is upheld, potential whistle-

blowers would have no incentive to bring wrongdoing to light prior to filing a *qui tam* suit. Conversely, if a public disclosure acts as a bar to a later *qui tam* suit except for plaintiffs who were a source of the public disclosure, as we contend, then individuals with information on government fraud would have a strong incentive "to report such information at the earliest possible time." *Id.* (internal quotation omitted).

Moreover, confining the "original source" exception to relators who are the source of the public disclosure directly addresses the specific problem that was the "catalyst" for the 1986 changes – namely, the decision in *United States ex rel. Wisconsin v. Dean, supra. See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 684 (D.C. Cir. 1997). The concern raised by *Dean* was having the relator's own disclosure boomerang into a ground for barring a later *qui tam* suit, thus creating a strong disincentive for whistleblowers to make the disclosure in the first place. The "original source" exception directly cured that problem by excepting the source of a public disclosure from the general bar created by that disclosure. The Tenth Circuit's interpretation, conversely, does not directly address that problem. It focuses on the state of the relator's knowledge, but takes no account of the extent to which the relator bore any responsibility for the disqualifying public disclosure. Thus, interpreting section 3730(e)(4) to require that an "original source" have been the source of the public disclosure best implements the policies that motivated Congress's enactment of that section.[4]

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[4] The D.C. Circuit harmonized the two subsections in a different way in *Findley*, holding that the relator need not be a source of the public disclosure but that the relator's disclosure to the government must precede the public disclosure. 105 F.3d at 689-91. That interpretation would further the FCA policies that Congress sought to implement in enacting the public disclosure bar in 1986, and it is clearly superior to the interpretation applied by the Tenth Circuit in this case. We believe, however, that construing section 3730(e)(4) to

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

ALAN I. HOROWITZ
Counsel of Record
ROBERT K. HUFFMAN
PETER B. HUTT II
R. WESTON DONEHOWER
MILLER & CHEVALIER CHARTERED
655 15th Street, NW, Suite 900
Washington, D.C. 20005
(202) 626-5800

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require that an original source be a source of the public disclosure is the interpretation that best harmonizes the text of the statute, its history, and the policy goals that Congress unquestionably sought to promote.